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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Gonzalo Estrada and Aurelia Martinez, on
10 behalf of themselves and all individuals
11 similarly situated,

No. CV-02-00591-PHX-RCB

ORDER

12 Plaintiffs,

13 v.

14 Bashas' Incorporated,

15 Defendant.

16 **Introduction**

17 Currently pending before the court is a motion for reconsideration by defendant
18 Bashas' Incorporated (Doc. 309). Bashas' is seeking to have this court reconsider its
19 order in Parra v. Bashas', Inc., 291 F.R.D. 360 (D.Ariz. 2013), granting plaintiffs' motion
20 for class certification with respect to their pay claim. For the reasons set forth herein, the
21 court denies defendant Bashas' motion.

22 **Background**

23 Pursuant to Fed.R.Civ.P. 23(b)(3), this court certified a class, defining it as
24 follows:

25 All Hispanic workers currently and formerly employed
26 by defendant Bashas' Inc. in an hourly position at any
Food [C]ity retail store since April 4, 1998, who have

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28 ¹ “Originally, José Parra also was a named plaintiff, but he has since withdrawn, although
he remains a member of the putative class.” Parra, 291 F.R.D. at 365 n. 3 (citation omitted).
Accordingly, the court is omitting Mr. Parra from the caption.

1 resolution of the claim . . . is, of course, [an] insufficient [basis] for . . . grant[ing] a
 2 motion for reconsideration.”) Likewise, a motion for reconsideration may not be used to
 3 “ask[] this court to rethink what [it] . . . already thought through, rightly or wrongly.”
 4 Morgal v. Maricopa County Bd. of Sup’rs, 2012 WL 2368478, at *1 (D.Ariz. June 21,
 5 2012) (internal quotation marks and citations omitted). Reconsideration motions “are
 6 not the place for parties to make new arguments not raised in their original briefs.”
 7 Motorola, Inc. v. J.B. Rodgers Mech. Contractors, 215 F.R.D. 581, 582 (D.Ariz. 2003)
 8 (citing Northwest Acceptance Corp. v. Lynnwood Equip., Inc., 841 F.2d 918, 925-26 (9th
 9 Cir. 1988)). Thus, as is evident, “[m]otions for reconsideration are disfavored and should
 10 be granted only in rare circumstances.” Ellsworth, 2013 WL 1149937, at *1 (quoting
 11 Morgal, 2012 WL 2368478, at *1 (other quotation marks and citation omitted). It is
 12 against this legal backdrop that the court will consider Bashas’ reconsideration motion.²

14 ² Before doing so, however, there is one preliminary issue arising from Bashas’ reliance
 15 upon portions of deposition testimony, which it acknowledges were not part of its opposition to class
 16 certification. See Reply (Doc. 314) at 6:25-28, n. 2. Bashas’ is relying upon those deposition excerpts to
 17 argue that it is “entitled to a trial on each of the pay equalization measures [it] took over a several-year
 18 period.” Reply (Doc. 314) at 6:1 (emphasis omitted).

17 Bashas’ contends that it is entitled to supplement the record in that regard because “on remand
 18 from the Ninth Circuit[]” the plaintiffs modified their class definition. Id. at 6:26-27, n. 2. Actually, the
 19 plaintiffs modified their class definition, not “on remand,” but, rather, when they decided not to pursue
 20 “on appeal” the “so-called [] Subject Placement claim[.]” See Parra, 291 F.R.D. at 373 (internal
 21 quotation marks and citation omitted).

20 Of arguably more import is the fact that United States v. \$405,089.23 U.S. Currency, 122 F.3d
 21 1285 (9th Cir. 1997), Bashas’ sole legal authority for allowing it to supplement the record, is wholly
 22 distinguishable. Based upon evidence obtained after the institution of that action, the district court found
 23 that the Government had established probable cause for the forfeiture of the targeted assets. Finding to
 24 the contrary, the Ninth Circuit reversed. Instead of remanding with instructions to grant summary
 25 judgment in favor of the claimants, the Ninth Circuit instructed the district court to give the Government
 26 an opportunity to supplement the record. Id. at 1291-1292.

24 The Ninth Circuit did so for two reasons. First, after the district court had granted summary
 25 judgment in the Government’s favor, there was an intervening Ninth Circuit decision making clear that in
 26 this Circuit the Government is prevented from relying upon evidence obtained after the institution of
 27 forfeiture proceedings to support a probable cause finding. Second, the Ninth Circuit relied upon the
 28 Government’s representations that it possessed evidence obtained prior to the institution of that forfeiture
 proceeding to establish the necessary probable cause. It is patently obvious that neither of those
 relatively unique circumstances is present here. Thus, \$405,089.23 U.S. Currency does not provide a
 basis for allowing Bashas’ to supplement the record at this late stage. This is all the more so given the
 possible prejudice to plaintiffs which would occur by allowing Bashas’ to supplement the record in its
 reply. Accordingly, the court is not considering the three exhibits attached to Bashas’ reply.

1 **II. Analysis**

2 Bashas' diffuse approach makes it difficult to ascertain the precise grounds which
3 it claims warrant reconsideration. What is readily ascertainable though is that Bashas'
4 has not met the demanding standards necessary to warrant granting the extraordinary
5 remedy of reconsideration. See 11 C. Wright & A. Miller, Federal Practice and
6 Procedure § 2810.1 (2d ed.1995) (The granting of a motion for reconsideration "is an
7 extraordinary remedy which should be used sparingly.")

8 Despite LR Civ. 7.2(g)(1)'s prohibition against repetitive arguments, at the outset
9 Bashas' essentially concedes that it is repeating its argument that there are facts in dispute
10 precluding a finding of class-wide liability. See Mot. (Doc. 309) at 1:20-21 ("As Bashas'
11 explained in its prior briefs, there are facts in dispute, which preclude deciding liability
12 on a class-wide basis.") This is not the only argument which is repetitive, and hence is an
13 improper basis for reconsideration. Bashas' motion and reply include a litany of other
14 arguments which are all too familiar to this court.

15 Just as it did in opposing class certification, Bashas' argues that "individual issues
16 predominate over any common ones." Compare Mot. (Doc. 309) at 4:21-22 (emphasis
17 omitted) with Resp. to Mot. for Class Certification (Doc. 190) at 72-76; and Supp.
18 Opening Br. (Doc. 301) at 19:9-20. Of course, after a fairly in-depth analysis, this court
19 found to the contrary. See Parra, 291 F.R.D. at 390-393. Continuing to maintain that
20 individual issues predominate, Bashas' reiterates that some unspecified class members
21 were not harmed by its two-tiered wage scale. More specifically, Bashas', as it did
22 previously, asserts that "there were Food City employees in job categories which had
23 *higher* wage rates than those paid to their counterparts at Bashas'." Compare Mot. (Doc.
24 309) at 1:24-26 (emphasis in original) with Supp. Opening Br. (Doc. 301) at 4:10-11
25 (emphasis added) ("*Some Food City pay rates* were the same or *actually higher* than
26 those used at Bashas' or A.J.'s stores."); id. at 14:1-3 (emphasis added) ("The reality is
27 that there were differences in pay scales between formats, and *some Food City employees*
28 (Hispanic or not) *fared better* than their A.J.'s and Bashas' counterparts while others did
not.")

1 Additionally, Bashas' continues to argue that because its wage scales were
 2 equalized over time, there will need to be separate liability trials for "many" of the pay
 3 steps. See Mot. (Doc. 309) at 6:6. This, too, is an argument which has previously been
 4 made to this court, and hence is not a proper basis for seeking reconsideration. See
 5 Supp. Opening Br. (Doc. 301) at 5:20-22; and at 5: 8-9 ("[T]o determine whether – and to
 6 what extent -- any Food City employees was paid less than a counterpart at Bashas' or
 7 A.J.'s, assuming such a counterpart existed, would turn on these assorted individual
 8 variables[,]” including “the equalization of pay rates for different positions occur[ring] at
 9 different paces[.]”).

10 Bashas' argument that manager discretion may have favored Hispanics is yet
 11 another example of Bashas' repeating a previously made argument. Compare Mot. (Doc.
 12 309) at 2:24-28 (“[D]epending on what a particular store manager values in a new
 13 employee . . . , a Food City employee could have been placed higher on the pay scale
 14 than he would have been placed had he applied at a Bashas' store run by a different
 15 manager with different priorities and different (and evolving) needs.”) with Supp.
 16 Opening Br. (Doc. 301) at 14:6-7 (“[I]n some instances, employees may have benefited
 17 from this discretionary practice while, in others, they may have not[.]”) As an aside, the
 18 court observes, as the plaintiffs note, that the record evidence is that “[i]n every year
 19 studied, Hispanics are paid less than whites assigned to the same position *at the time of*
 20 *hire* and the differences are statistically significant in every year, except 1999.” Rebuttal
 21 Report of Dr. Richard Drogin, Ph.D. (Sept. 3, 2004) at 2, ¶ 6 (emphasis added). Thus,
 22 not only is Bashas' asserting an improper basis for reconsideration, but the record as
 23 presently constituted substantively undermines its manager discretion argument.

24 The foregoing arguments are by no means the only repetitious arguments made by
 25 Bashas', but they are illustrative and highlight Bashas' dissatisfaction or disagreement
 26 with Parra, 291 F.R.D. 360. Such repetitious arguments also readily show that essentially
 27 Bashas' is asking this court to rethink Parra. Neither is a proper basis for a motion to
 28 reconsider, however. See discussion supra at 2-3.

Especially because Bashas' motion and reply are rife with repetitive arguments,

1 the court would be well within its discretion in denying reconsideration on that basis
2 alone, as LR Civ. 7.2(g)(1) contemplates. There is another equally compelling reason for
3 denying reconsideration, however: Bashas' has not shown manifest error so as to warrant
4 reconsideration pursuant to LR Civ. 7.2(g)(1). It is not enough to simply incant the
5 phrase "manifest error." See Mot. (Doc. 309) at 1:17. Bashas' must identify each such
6 error and explain how it is "plain and indisputable[,] . . . amount[ing] to a complete
7 disregard of the controlling law or the credible evidence in the record." See Black's.
8 Bashas' has not done that.

9 Although Bashas' claims that Parra contains "at least two manifest errors[.]" it
10 only explicitly identifies one. See Mot. (Doc. 309) at 1:17. In its reply Bashas' declares:
11 "This alone is manifest error: [This] Court[] assume[d] that, where a pay step at Food
12 City is lower than the same pay step at Bashas', more Hispanic employees occupy that
13 pay step at Food City than White employees." Reply (Doc. 314) at 5:14-16 (citation
14 omitted). Even assuming *arguendo* that the court explicitly or implicitly made such an
15 assumption (which it did not), Bashas' has not explained how that assumption "amounts
16 to a *complete disregard* of the controlling law *or* the credible evidence in the record."
17 See Black's (emphasis added). Furthermore, the foregoing does not, as Bashas'
18 presupposes, equate to an assumption that the plaintiffs established a prima facie case of
19 disparate impact. That determination must await another day.

20 Additionally, it appears as though Bashas' also is claiming that the "finding [in
21 Parra, 291 F.R.D. 360] that the pay scales at Bashas' and A.J.'s stores were higher than
22 those at Food City[]" was manifest error. See Mot. (Doc. 309) at 1:26-27 (internal
23 quotation marks omitted). This is because Bashas' asserts that that "finding . . . is not
24 true for the entire class[]" in that there were "Food City employees who earned more than
25 their counterparts at Bashas' stores[.]" Id. at 1:27-2:1. Those employees, Bashas'
26 argues, "cannot recover damages" in that "they actually *benefitted* from the pay scales."
27 Id. at 2:1-2.

28 Bashas' has not met its burden of showing that that finding constitutes manifest
error. First, that finding is based upon one of "three significant . . . conce[ssions]" by

1 Bashas'. Parra v. Bashas' Inc., 291 F.R.D. 360, 374 (D.Ariz. 2013) (quoting Parra v.
2 Bashas' Inc., 536 F.3d 975, 979 (9th Cir. 2008) (other citation omitted). More
3 specifically, this court recited that "the pay scales at Bashas' and A.J.'s stores were
4 higher than those at Food City *during the period 1998-2000[.]*" Id. (emphasis added).
5 It is difficult if not impossible to see how a previous concession by Bashas', adopted by
6 the Ninth Circuit and this court, can support a finding of manifest error, *i.e.*, a complete
7 disregard of the credible evidence.

8 Second, Bashas' has not shown a complete disregard of the controlling law on this
9 point. The court did not hold, as Bashas' implies, that class members who were not
10 actually harmed or did not sustain an actual injury can recover monetary damages. This
11 court simply held that the plaintiffs had "provide[d] the 'convincing proof of a
12 companywide discriminatory pay . . . policy' missing from Dukes[.]" to support a finding
13 of commonality. Parra, 291 F.R.D. at 374 (quoting Wal-Mart Stores, Inc. v. Dukes, 564
14 U.S. ----, ----, 131 S.Ct. 2541, 2556, 180 L.Ed.2d 374 (2011)).

15 Bashas' other reconsideration theories likewise are unavailing. In its reply,
16 Bashas' clarifies that its first "dispositive" reconsideration argument is that the
17 "[p]laintiffs have not established a prima facie case of discrimination with respect to any
18 of the proposed class members[.]" Reply (Doc. 314) at 1:16-18. Bashas' does not
19 correlate this argument to its motion for reconsideration though. It does not, for example,
20 explain how plaintiffs' alleged shortcomings in proof translate to manifest error, or
21 otherwise justify reconsideration here, and the court declines to speculate.

22 Suffice it to say that neither of the cases to which Bashas' cites, Moran v. Selig,
23 447 F.3d 748 (9th Cir. 2006) (disparate treatment), and Garcia v. Spun Steak Co., 998
24 F.2d 1480 (9th Cir. 1993) (disparate impact), stand for the proposition that at the class
25 certification stage it is incumbent upon the plaintiffs in the first instance to make a prima
26 facie showing of discrimination stage. Rather, in both of those cases, the courts were
27 examining the sufficiency of plaintiffs' prima facie proof at the summary judgment stage.
28 Consequently, neither Moran nor Garcia advance Bashas' reconsideration argument on
this issue.

1 Further, and in keeping with the controlling law, in Parra this court expressly
2 declined to “turn the[] class certification proceedings into a dress rehearsal for the trial
3 on the merits.” Parra, 291 F.R.D. at 368 (quoting Messner v. Northshore University
4 HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012) (citations omitted)). That “prohibition
5 on requiring Plaintiffs to establish their claims at the class certification stage was . . .
6 reinforced by the Supreme Court in *Amgen Inc. v. Connecticut Retirement Plans and*
7 *Trust Funds*, --- U.S. ---, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013).” Parsons v. Ryan, 289
8 F.R.D. 513, 516 (D.Ariz. 2013). There, as this court pointed out in Parra, the Supreme
9 Court “cautioned that ‘Rule 23 grants no license to engage in free-ranging merits inquiries
10 at the certification stage.’” Parra, 291 F.R.D. at 368 (quoting Amgen, 133 S.Ct. at 1194-
11 95) (other citation omitted); see also Smith v. Microsoft Corp., 2014 WL 323683, at *2
12 (S.D.Cal. Jan. 28, 2014) (quoting Staton v. Boeing Co., 327 F.3d 938, 954 (9th Cir. 2003)
13 (citations and internal quotation marks omitted)) (“Although some inquiry into the
14 substance of a case may be necessary[,] however, ‘it is improper to advance a decision
15 on the merits to the class certification stage.’”) In part, that is because, as this court also
16 previously recognized, “Rule 23(b)(3) requires a showing that *questions* common to the
17 class predominate, not that those questions will be answered, on the merits, in favor of
18 the class.” Id. (quoting Amgen, 133 S.Ct. at 1191) (emphasis in original). Thus, “it
19 remains relatively clear that an ultimate adjudication on the merits of plaintiffs’ claims is
20 inappropriate, and that any inquiry into the merits must be strictly limited to determining
21 whether plaintiff’s allegations satisfy Rule 23.” See Herrera v. Service Employees
22 Intern. Union Local 87, 2013 WL 1320443, at *2 (N.D.Cal. April 1, 2013) (citing Ellis v.
23 Costco Wholesale Corp., 657 F.3d 970, 983 n. 8 (9th Cir. 2011)). Seemingly, Bashas’ is
24 overlooking the purpose of a Rule 23(b)(3) certification. It is “not to adjudicate the case;
25 rather, it is to select the metho[d] best suited to adjudication of the controversy fairly and
26 efficiently.” Parra, 291 F.R.D. at 390 (quoting Amgen, 133 S.Ct. at 1191) (internal
27 quotation marks omitted).

28 Consistent with the foregoing, in Parra this court did not delve into whether the
plaintiffs made a prima facie showing of discrimination, an inquiry Bashas’ strongly

implies this court should have undertaken in Parra. Moreover, despite what the parties seem to believe, nothing in Parra, 291 F.R.D. 360, excuses the plaintiffs from having to establish a prima facie case of discrimination. And, at least with respect to the disparate impact claim,³ the plaintiffs must prove such charge by a preponderance of the evidence. See Paige v. California, 291 F.3d 1141, 1145 n. 4 (9th Cir. 2002) (citations omitted). At this point, however, “[n]either the possibility that [the] plaintiff[s] will be unable to prove [their] allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for” reconsidering the decision “to certify a class which apparently satisfies the Rule.” See Wolin v. Jaguar Land Rover North America, LLC, 617 F.3d 1168, 1173 (9th Cir. 2010) (quoting Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975)).

Before concluding, the court must address the pending stipulation (Doc. 316), wherein the parties stipulate to amend the class definition. In light of that stipulation, the class definition is hereby amended and is defined as follows:

All Hispanic workers currently and formerly employed by defendant Bashas’ in an hourly position at any Food City retail store between April 4, 1998 and July 1, 2007, who have been subject to the challenged pay policies and practices. The Class does not include any member who worked for Food City for less than eight (8) hours during the Class Period or any person who was first hired for an hourly position at Food City after January 2, 2005.

Conclusion

To conclude, the court hereby ORDERS that:

- (1) Bashas’ Motion for Reconsideration of Order Certifying Class on Plaintiffs’ Pay Claim (Doc. 309) is **DENIED**;
- (2) Pursuant to the parties’ stipulation (Doc. 316), the class definition is **AMENDED** and the class is defined as set forth above; and
- (3) Within **fourteen (14) days** from the date of entry of this Order, in conformity with Fed.R.Civ. P. 23(c)(2)(B), the parties shall submit jointly an agreed upon form of

³ It appears to the court, as it does to Bashas’, that at this juncture, the plaintiffs’ only remaining theory of discrimination is disparate impact.

1 notice, incorporating the amended class definition set forth above, a joint proposal for
2 dissemination of the notice, and the time-line for opting out of the action. The plaintiffs
3 must bear the costs of the notice, which shall include mailing by first-class mail.

4 Dated this 31st day of March, 2014.

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8 Robert C. Broomfield
9 Senior United States District Judge
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